

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 208 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

USHABEN NARENDRA KOLEKAR

Versus

ANANDIBEN VISHNUPRASAD TRIVEDITHRO'POWER OF ATTORNEY

Appearance:

MR SK BUKHARI for Petitioner

MR MUKESH R SHAH for Respondent No. 1, 2, 3, 4, 5

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 16/04/96

ORAL JUDGEMENT

1. The petitioner has challenged the legality and validity of the order passed below Exh.57 by the Civil Judge (JD) in Regular Civil Suit No.1531/84. The suit was filed by respondent Nos 1 to 4 against the present petitioner for declaration as well as for injunction as regards parcels of land allegedly encroached upon by the petitioner-defendant. It appears that in said suit the

present petitioner-defendant has appeared and filed the counterclaim at Exh.12. It was the case of the plaintiffs that they have sold the land admeasuring 1646 Sq.Ft. for consideration of Rs.22,000/- by registered sale deed dated 28.7.83 but he was trying to encroach upon the land admeasuring 482.81 Sq.Ft. towards East which is already sold. It was for this reason that the suit for declaration and permanent injunction was filed with respect to land admeasuring 482.81 Sq.Ft.

2. In said suit the petitioner-defendant has appeared and filed written statement on 3.10.1984 containing counterclaim under Order 8 Rule 6A of C.P.Code. Said written statement is to be found at Exh.12. In such counter claim it is alleged by the defendant that she has purchased the land admeasuring 197 Sq.Mtrs from the plaintiff but that there was some mistake in the sale deed and that therefore the sale deed was required to be rectified and the plaintiff should be directed to rectify the sale deed by correctly showing the area of land sold by the plaintiffs to defendants. Admittedly such counterclaim is pending.

3. It appears that the said suit thereafter came to be dismissed on 5.9.89 as plaintiffs as well as their advocates failed to appear and it was dismissed of suit for default. On 10.2.94 in the said suit which is dismissed for default, an application is made by the respondent No.5 for impleading him as party defendant under Order 1 Rule 10 of C.P.Code interalia contending that he has subsequently by registered sale deed dated 6th June, 1985 purchased the suit land which was including disputed area admeasuring 482.81 Sq.Ft. Such an application is granted by the trial court and it is against said order that the petitioner-defendant has approached this court under section 115 of C.P.Code.

4. Mr.S.K.Bukhari, learned advocate for petitioner has submitted before this court that in a suit being Reg.C.S.No.1531/84 having already been dismissed for default as back as 5.9.85 no application could have been entertained by the trial court and the trial court could not have joined the respondent No.5 as party defendant to the suit. This court was prima facie convinced by that fact and therefore called for the report of the 2nd Joint Civil Judge(JD) at Baroda to know as to how and under what circumstances he passed the impugned order impleading the respondent no.5 as party defendant to the suit which was dismissed for default. The report of the learned trial judge is received by this court and on perusing the said report it is for the first time

disclosed to the court that though the aforesaid suit of the plaintiffs came to be dismissed for default counterclaim which was filed by the petitioner-defendant was already pending, and when such counterclaim is pending before the court, it was permissible for the court to entertain application under Order 1 Rule 10 of C.P.Code. In this connection it would be necessary to refer to the provisions of Order 8 Rule 6A to 6D of the C.P.Code. Said provisions are reproduced hereunder:

Rule: "6A(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counterclaim against the claim of the plaintiff any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not:

Provided that such counterclaim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and counterclaim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.

(4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints.

6B Where any defendant seeks to rely upon any ground as supporting a right of counterclaim, in his written statement, state specifically that he does so by way of counterclaim.

6C. Where a defendant sets up a counterclaim and the plaintiff contends

that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application makes such order as it thinks fit.

6D. If in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with".

5. From the aforesaid provisions of the Code which came to be introduced by the Amendment Act, 1976 it becomes clear that a defendant in a suit may set up by way of counterclaim against the claim of the plaintiff and right or claim in respect of a cause of action affording the defendant against the plaintiff's right to relief either before or after filing of suit and such counter claim shall be entertained as the claim of the defendant. As and when such counterclaim is filed, under Sub.Rule(3) the plaintiff shall be at liberty to file written statement in answer to the counterclaim of the defendant. Under Sub.Rule (4) the counterclaim shall be treated as a plaint and governed by the Rules applicable to the plaints. Rule 6D makes the provision more clear by providing that if in any case the defendant has set up the counterclaim , the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with. It is thus clear that the counterclaim shall have to be treated as suit and shall have to be tried by the court unless such claim is specifically abandoned by the defendant himself. It may also be noted that the Rule 6G provides that the Rules relating to a written statement by the defendant shall apply to a written statement filed in answer to a counterclaim. It is thus clear that the counterclaim is therefore treated as an independent suit because the plaintiff is given right to file written statement to the said counterclaim and even when the suit of the plaintiff is dismissed the counterclaim may be proceeded with by the defendant.

6. In view of the aforesaid fact situation it can not be said that the trial court has no jurisdiction to entertain and decide the suit under Order 1 Rule 10 of

the CPC especially when the defendant No.3 has already averred and alleged that by registered sale deed the parcel of land including the disputed land is sold to him and therefore he is necessary or proper party which is required to be impleaded in the suit. In such a situation, the trial court was fully justified in entertaining the application and granting the same because the claim of the petitioner-defendant being counterclaim which is to be treated as separate suit is still pending in the court and as such presence of third party is necessary to effectively and finally adjudicate upon the issues which may arise with respect to the property in question. This court therefore does not find any error of jurisdiction. Report submitted by the trial court is accepted. In the result, this CRA fails. Rule is discharged. No costs.

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